

No. 11821

United States
Circuit Court of Appeals
for the Ninth Circuit

DAWSON COUNTY, MONTANA,

Appellant,

vs.

MARY HAGAN, E. B. CLARK and MINNIE R. EVANS,
on their own behalf and on behalf of all bondholders
of the Upper Glendive-Fallon Irrigation District of
the State of Montana, and UNITED STATES OF
AMERICA,

Appellees,

and

MARY HAGAN, E. B. CLARK and MINNIE R. EVANS,
on their own behalf and on behalf of all bondholders
of the Upper Glendive-Fallon Irrigation District of
the State of Montana,

Appellants,

vs.

EDNA YALE, ALLEN W. YALE and RUBY YALE,
his wife, and RUTH PETTERSON and HANS
PETTERSON, her husband, THE SCOTTISH
AMERICAN MORTGAGE COMPANY, LIMITED,
UNITED STATES OF AMERICA, DAWSON
COUNTY and PRAIRIE COUNTY,

Appellees.

Appellant's Reply Brief

Upon Appeals from the District Court of the United States
for the District of Montana

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OPTION BY COUNTY WAS A CONTRACT
OF PURCHASE:

We agree with the appellees that the option contract of the county was a sale. (Tr. p. 24) Prior to the first option contract between the County and the U. S. the county had offered all of the lands involved at public sale pursuant to Montana Law and no bidders appeared and no sale was had. (Tr. pp. 52 to 58) all shown as a part of the Answer of Dawson County. Thereafter on September 5, 1940 an agent of the Farm Security Administration an agency of the United States prepared and presented to the county a resolution whereby the county would sell all of the acreage involved herein for a lump sum agreed upon. (Tr. pp. 59 to 63) A year later a renewal of the option was made but a Stipulation was then entered into between the parties whereby the price was fixed for all purposes (Tr. pp. 95 - 96) this to insure no change in the situation as the United States had taken possession on the first option and removed all buildings, fences and other obstructions to its use of the lands. Abstracts were procured by the county at its expense and furnished to the United States under the conditions of the option contract.

Thereafter the County was under the terms of its contract of sale estopped from taking any further action under the terms of the stipulation as the government had taken over the lands at a fixed price and no action in the

condemnation action to be brought by the government was possible. The said action (the present one herein) was taken as the attorneys for the government admit for the purpose of quieting title to the lands involved. There was no attempt on the part of the government attorneys to set aside, abrogate or invalidate the previous contracts made to purchase the lands. This same situation has been before the Supreme Court of Montana involving the same option contracts in the case of the sale of lands by an individual to the U. S. In that case Calvin v. Custer County (111 Montana 162-107 Pac (2nd) 134) in which all of the points in controversy here as to the option contract and its validity were ruled upon.

We quote from page 166:

“It should first be noted that while the writing in question here was called an ‘exclusive and irrevocable option and right to purchase’ yet it is clear from its terms as a whole that after its acceptance by the United States it became a contract of sale and purchase.” ****

Since in this case as we have already pointed out the United States took possession and had a stipulation made at the same time fixing the price for all purposes and with knowledge that the lands would be the subject of an action for condemnation to clear the title, it is now beyond dispute that the government was the equitable owner of the lands and that the doctrine of equitable conversion prevails here and as stated in the case *supra*; at page 167, we quote:

"In Kern v. Robertson 92 Montana 283, 12 Pac. (2) 565; The authorities are in accord that an enforceable contract for the purchase and sale of real property passes to the purchaser the equitable and beneficial ownership thereof, leaving only the naked legal title in the seller, as trustee for the purchaser and as security for the unpaid purchase price."

The rule is stated in 13 C. J. 855 as follows:

"A contract for the sale of land works a conversion, equity treating the vendor as holding the land in trust for the purchaser, and the purchaser as trustee of the purchase price for the vendor. The vendor's interest thereafter in equity is in the unpaid purchase price, and is treated as personalty, while the purchaser's interest is in the land and is treated as realty." To the same effect is 18 C. J. S. Conversion, Section 9, page 48, and 19 Am. Jur. Equitable conversion section 11. *****

In section 1161 Pomeroy's Equity Jurisprudence 4th Ed. it is said:

"The fact that the contract of purchase is entirely at the option of the purchaser does not prevent its working a conversion, if he avails himself of the option."

And in section 1163, the same author states:

"In contracts of sale with the purchaser's option, the question whether or not a conversion is effected at all cannot of course be determined until the purchaser exercises his option; but the moment when he does exercise it, the conversion, as between the parties claiming title under the vendor, relates back to the time of the execution of the contract."

Here the option was exercised by the taking of possession by the United States and fixing of the full value to be paid by the Stipulation (Tr. pp. 95 - 96) which for all purposes agreed upon was the price to be paid. The sale was fully consummated. The conversion relates back to that date.

ASSESSMENTS: TRUSTEE DOCTRINE

Appellees' brief (pp. 17 to 24) dealing with the assessments for irrigation purposes confuses the instant case with other cases based upon different facts and statutes not applicable to the present case, here there were never any irrigation assessments paid, no irrigation, no works constructed and the sale of the lands for taxes and assessments was made under different statutes.

Much is said about the "debenture certificates" to be issued under certain provisions of Montana law, but here there never were any such issued, hence no vested interest in the lands all of which were subject to general taxes, none of which were paid so that in due time the taxing authorities were obliged to take tax deeds. The bondholders abandoned their security by not paying the taxes in some of the many ways open to them under Montana law. No attempt was made by any of the bondholders to organize and protect their rights for the simple reason that the lands unirrigated were not worth the general taxes. There was no trusteeship on the part of the county as the county did not at any time

have any funds collected from the landowners belonging to the irrigation district. The small sum in the County Treasurer's possession was derived from assessments made in the beginning for the general expense of the district and has remained there subject to warrants for engineering and other costs in the operation of the district. No authorities are cited in support of the trustee doctrine and there are none known to either of the parties to this action, the doctrine of the Malott case (89 Mont. 37 296 Pac. 1) did not have any issue before the court to decide on this phase of the law.

EFFECT OF TAX DEEDS:

The passage of Chapter 63 of the Laws of 1937, did not affect the irrigation districts and bonds issued by them prior to the enactment of this amendment. The act was not retroactive but prospective (State ex rel City of Billings v. Osten, 91 Montana 76, 5 Pac. (2) 562.) In this case the bonds were issued in 1923 and the district created in 1920, so that the laws in effect at that time applied to the lien of the bonds and the enactment of the 1937 act was not applicable to either the district or its bonds. The law in regard to this phase of the matter is well reviewed in the Montana case of Cascade County v. Weaver et al; 108 Mont. 1 90 Pac. (2) 164. From this case it appears that only those districts created after the passage of the act may look to its "exceptions" for their benefit.

CONCLUSION

We conclude by pointing out that at no time after the creation of the District was there any funds in the County Treasurer's hands for the payment of the bonds or interest on them, no land owner paid any of the assessments made lawfully by the Commissioners of the district which ceased to function in 1927. The law does not require an officer to perform an idle or useless act. The bondholders could not collect that which did not exist. There were no funds. They failed to protect their lien under Montana law and it was effectually and absolutely wiped out by the tax deeds. The County obtained a new title and as the owner of the lands sold to the United States for a fixed consideration agreed upon by both parties is now entitled to the funds remaining which are the value of the lands taken both under the contracts made and the condemnation awards made in pursuance of these agreements.

Respectfully submitted:

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